

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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COMPLETE TITLE OF CASE:

BOB DEGEORGE ASSOCIATES, INC.;  
KD CHRISTIAN CONSTRUCTION CO.

Respondent,  
Respondent,

v.

HAWTHORN BANK

Appellant.

DOCKET NUMBER **WD72651**

DATE: May 24, 2011

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Appeal From:

Circuit Court of Jackson County, MO  
The Honorable John M. Torrence, Judge

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Appellate Judges:

Division One

Mark D. Pfeiffer, P.J., Victor C. Howard, and Thomas H. Newton, JJ.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**  
**MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

BOB DEGEORGE ASSOCIATES, INC.; Respondent, KD CHRISTIAN  
CONSTRUCTION CO., Respondent, v. HAWTHORN BANK, Appellant

**WD72651**

**Jackson County**

Before Division One Judges: Pfeiffer, P.J., Howard, and Newton, JJ.

Xtreme Powersports was planning to buy a building and three tracts of land. It contracted with DeGeorge to remodel the building, and DeGeorge subcontracted with KD Christian to perform some of the work. Xtreme subsequently borrowed the money to purchase the property from Hawthorn Bank (Hawthorn) and executed a deed of trust in favor of Hawthorn. Hawthorn did not record the deed at that time. DeGeorge and KD Christian subsequently performed the work but Xtreme failed to pay the amounts due. DeGeorge filed a mechanic's lien on the property. Hawthorn subsequently recorded its deed of trust. KD Christian also filed a mechanic's lien.

DeGeorge sued Xtreme seeking to foreclose its mechanic's lien. KD Christian intervened, naming Hawthorn as a third-party defendant. Xtreme confessed judgment to DeGeorge. Subsequently, DeGeorge moved for summary judgment, contending that its lien was superior to Hawthorn's. Hawthorn moved for summary judgment against DeGeorge and KD Christian, arguing that its lien was superior to their mechanics' liens. The trial court entered summary judgment in favor of DeGeorge, finding that Hawthorn's interest in the property was subordinate to the liens. It subsequently entered a final judgment in favor of DeGeorge and KD Christian, finding they were entitled to foreclose their liens, any sale proceeds were to be distributed *pro rata*, with any excess after the liens to be distributed to Hawthorn. Hawthorn appeals.

**REVERSED AND REMANDED**

**Division One Holds:**

Hawthorn contends the trial court erred because pursuant to Missouri common law, a purchase money deed of trust has priority over a mechanic's lien. DeGeorge and KD Christian, however, assert that because Hawthorn recorded its mortgage subsequent to the liens arising, under Missouri recording statutes and the "first spade" rule, the mortgage is subordinate to the liens.

Under the first spade rule, mechanics' liens attach with the first delivery of material or commencement of work. However, mechanic's liens do not take precedence over a purchase money deed of trust that secures repayment of funds used to purchase land upon which the improvements giving rise to the lien claims are erected. Hawthorn contends that its recording of its deed of trust after DeGeorge's and KD Christian's commencement of work did not affect its priority.

Our case law does not support that DeGeorge's and KD Christian's liens have priority. We have not found that the failure to record creates an exception to purchase money mortgage priority. In fact, Missouri case law suggests the opposite. We have held that a purchase money deed of trust not even executed until after the work commences has priority as to the realty. Consequently, it cannot be said that a purchase money deed of trust executed but not recorded until after the work commences does not also have priority. As a result, the trial court erred in finding that Hawthorn's interest in the property was subordinate to the liens.

KD Christian further suggests that the mechanics' liens enjoy undisputed priority in the improvements they provided pursuant to section 429.050. Section 429.050 provides that a lien for erections or improvements shall have a priority in interest over a prior encumbrance, but that such lien only attaches to the buildings, erections or improvements for which they were furnished or the work was done. This section protects lien priority in new construction over a prior mortgage on the land and grants the lien claimant the right to order improvements sold or removed. However, it does not grant the lien claimant priority in the land itself, nor does it grant priority for liens based on repairs.

Because the trial court held that DeGeorge and KD Christian's liens had priority over the entirety of the realty, no findings were made as to whether the liens represented work with respect to repairs, or with respect to improvements. It thus cannot be determined whether DeGeorge's and KD Christian's liens fall within section 429.050. Consequently, we must remand.

Opinion by Thomas H. Newton, Judge

May 24, 2011

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